No. 18-15

IN THE
Supreme Court of the United States

JAMES L. KISOR,

Petitioner,

v.

ROBERT L. WILKIE,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF OF THE NATIONAL RIGHT TO WORK LEGAL DEFENSE FOUNDATION, INC. AS *AMICUS CURIAE* SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether the Court should overrule *Auer v. Robbins*, 519 U.S. 452 (1997), and *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945).

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INTEREST OF *AMICUS CURIAE*[1]

The National Right to Work Legal Defense Foundation, Inc. ("Foundation") has been the nation's leading litigation advocate for employee free choice since 1968. In furtherance of this mission, Foundation staff attorneys have represented individual employees in numerous cases before this Court, lower federal courts, and agencies. *E.g.*, *Janus v. State, Cty., & Mun. Emps.*, 138 S. Ct. 2448 (2018); *Harris v. Quinn*, 134 S. Ct. 2618 (2014); *Knox v. SEIU, Local 1000*, 567 U.S. 298 (2012); *Commc'ns Workers of Am. v. Beck*, 487 U.S. 735 (1988).

The Foundation has a particular interest in this case's outcome because it currently represents hundreds of employees across the nation whose free choice to refrain from unionization and collective bargaining largely depends on the National Labor Relations Board's ("NLRB") proper implementation of the National Labor Relations Act ("NLRA"). Over the past several decades, the NLRB has been criticized for not regulating through notice-and-comment rulemaking and for engaging in excessive legal and

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[1] Pursuant to Supreme Court Rule 37.3(a), both parties received timely notice of *amicus curiae*'s intent to file this brief and consented to its filing. Pursuant to Supreme Court Rule 37.6, no counsel for any party authored this brief in whole or in part, and no person or entity other than the *amicus curiae* made a monetary contribution to its preparation or submission.

policy oscillation.[2] More recently, however, the NLRB has issued proposed rules on major employee rights' issues under the NLRA.[3] Thus, it is important for the NLRA's stability that the proper Administrative Procedure Act ("APA"), 5 U.S.C. § 551, *et seq*, rulemaking procedures—and the benefits that come with those procedures—are not undermined by "*Auer* deference."

SUMMARY OF ARGUMENT

The Court should overrule *Auer*, 519 U.S. 452, and *Seminole Rock*, 325 U.S. 410, as argued in Petitioner's brief. Amicus offers a unique perspective on one of Petitioner's arguments—that *Auer* deference injects intolerable unpredictability into agency action, Pet. Br. 37–43—and provides fuller context to that argument.

A. The APA was a long-fought compromise, producing a statutory scheme that tolerates broad congressional delegations to the administrative state but requires agencies to promulgate rules in a certain way to protect the regulated public. Notice-and-comment rulemaking is one of the chief protections included in that compromise. Notice-and-comment

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[2] *See, e.g.*, Samuel Estreicher, *Policy Oscillation at the Labor Board: A Plea for Rulemaking*, 37 ADMIN. L. REV. 163 (1985).

[3] *E.g.*, *Board Proposes Rule to Change its Joint-Employer Standard*, National Labor Relations Board (Sep. 13, 2018), https://www.nlrb.gov/news-outreach/news-story/board-proposes-rule-change-its-joint-employer-standard.

rulemaking protects administrative due process rights by providing fair notice and giving the public a chance to participate in agency law-making.

B. But, *Auer* deference undermines APA-granted administrative due process by causing instability in the law and allowing excessive agency legal and policy oscillation. Indeed, *Auer* deference allows an agency to amend a rule without going through notice-and-comment rulemaking and thus lessens the APA's safeguards. *See* Pet. Br. 25–33. It does this by allowing the agency to draft gap-filled rules and then receive judicial deference when it fills in those gaps in the future. *See* Pet. Br. 40.

Often, this will occur after a change in the Executive Branch's leadership. When a new administration comes into power, it appoints its own agency leadership and instills its own regulatory policy. This combination of easily-amended rules and turn-over in executive leadership leads to excessive legal and policy oscillation—abrupt changes in the legal landscape by agency fiat—causing tremendous harm to those regulated by the agency. *See id.*

C. Overruling *Auer* and *Seminole Rock* is important for restoring the rule of law in the administrative state. But that is only a first step. This Court should also revisit other deference doctrines that do not conform to the Constitution or APA.

ARGUMENT

This Court Should Overrule *Auer* and *Seminole Rock*.

A. APA notice-and-comment procedures are fundamental for protecting administrative due process.

Congress passed the APA to protect against the dangers of an unchecked Executive Branch. Indeed, the APA bolsters the Constitution's procedural due process provisions by protecting the regulated public from an overreaching government. It acts as "a bill of rights for the hundreds of thousands [(now millions)] of Americans whose affairs are controlled or regulated in one way or another by agencies of the Federal Government." Administrative Procedure Act: Legislative History, S. Doc. No. 298, 79th Cong., 2d Sess. 76 (1946). In this way, the APA is a "'basic and comprehensive regulation of procedures' . . . , [and] also a legislative enactment which settled 'long-continued and hard-fought contentions, and enacts a formula upon which opposing social and political forces have come to rest.'" *Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 523 (1978) (citation omitted); *see also*, Richard B. Stewart & Cass R. Sunstein, *Public Programs and Private Rights*, 95 HARV. L. REV. 1193, 1248 (1982) (noting the APA was a "working compromise, in which broad delegations of discretion were tolerated as long as they were checked by extensive procedural safeguards").

Specifically, the APA's notice-and-comment rulemaking process is one of the most fundamental protections the people have against an overreaching Executive. *See* George B. Shepard, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, 90 NW. U.L. REV. 1557, 1653 (1996) (noting the notice-and-comment provision "is the most important change the APA imposes on agency practice"). Notice-and-comment rulemaking does this by providing fair notice and allowing public participation in agency law-making. As this Court has noted, a "fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required." *FCC v. Fox TV Stations, Inc.*, 567 U.S. 239, 253 (2012). And "democratic governance and traditions of due process" demand that the public be "heard before they are subjected to the coercive power of the state." Thomas W. Merrill & Kristin E. Hickman, *Chevron's Domain*, 89 GEO. L.J. 833, 836 (2001).

Thus the APA is an important check on the administrative state and on "administrators whose zeal might otherwise [carry] them to excesses not contemplated in legislation creating their offices." *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1211 (2015) (citing *United States v. Morton Salt Co.*, 338 U. S. 632, 644 (1950)) (Scalia, J., concurring).

B. *Auer* Deference undermines the APA's due process protections by causing instability in the law and promoting excessive agency oscillation.

Auer deference undermines the APA's notice-and-comment rulemaking protections in two important ways, both of which affect fair notice. First, *Auer* deference promotes instability in the law. Second, and related, *Auer* deference promotes excessive agency oscillation.

1. *Auer* deference promotes instability in the law by giving agencies free rein to change the law without going through the quasi-legislative process the APA requires. Specifically, *Auer* deference "allows agencies to make binding rules unhampered by notice-and-comment procedures." *Perez*, 135 S. Ct. at 1212. Agencies do this by drafting "vague regulations because to do so maximizes agency power and allows the agency greater latitude to make law through adjudication rather than through the more cumbersome rulemaking process." *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 525 (1994) (Thomas, J., dissenting).

This instability in the law, in turn, diminishes fair notice. As members of the Court have recognized, *Auer* deference "creates a risk that agencies will promulgate vague and open-ended regulations that they can later interpret as they see fit, thereby 'frustrat[ing] the notice and predictability purposes of rulemaking.'" *Christopher v. SmithKline Beecham*

Corp., 567 U.S. 142, 158–59, (2012) (quoting *Talk Am., Inc. v. Mich. Bell Tel. Co.*, 131 S. Ct. 2254, 2266 (2011) (Scalia, J., concurring)) (alterations in the original, other citations omitted).

An acute example is the Department of Labor's ("DOL") "regulation by amicus" program, which was used in *Auer* itself. Starting in the mid-1990s, the DOL changed its legal position on the Fair Labor Standards Act ("FLSA") several times and received deference, including *Auer* deference, in many cases that allowed it to do so. *See* Deborah Thompson Eisenberg, *Regulation by Amicus: The Department of Labor's Policy Making in the Courts*, 65 FLA. L. REV. 1223, 1243–50 (2013) (summarizing the DOL's campaign to define the FLSA via interpretations advanced in amicus briefs and the resulting "wild flip-flops in the DOL's position on certain issues during a short period of time"). As this Court noted in *Christopher*, a case dealing with the DOL's attempt to regulate by *amicus*,

> [i]t is one thing to expect regulated parties to conform their conduct to an agency's interpretations once the agency announces them; it is quite another to require regulated parties to divine the agency's interpretations in advance or else be held liable when the agency announces its interpretations for the first time in an enforcement proceeding and demands deference.

567 U.S. at 158–59.

2. Deference to such changes in meaning—i.e., changes in the law—not only undermines administrative due process by creating instability in the law, but also causes excessive legal and policy oscillation.[4] This oscillation, in turn, undermines administrative due process, including fair notice. It is a continual agency flip-flopping cycle that leaves the regulated public with spinning heads.

The DOL example above is an apt example of this phenomenon as well. From the Clinton, to Bush, to Obama administrations, those regulated by the FLSA had to defend against ambush tactics by the DOL depending on the political party in power at that given time. Then-Judge Posner summed up the problem with agency oscillation well in a case dealing with the DOL's "gyrating" back and forth FLSA interpretations: "It would be a considerable paradox if before 2001 the plaintiffs would win because the President was a Democrat, between 2001 and 2009 the defendant would win because the President was a Republican, and in 2012 the plaintiffs would win because the President is again a Democrat." *Sandifer v. U.S. Steel Corp.* 678 F.3d 590, 599 (7th Cir. 2012).

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[4] This term is borrowed from Samuel Estreicher's *Policy Oscillation at the Labor Board: A Plea for Rulemaking*, 37 ADMIN. L. REV. 163 (using the term "policy oscillation" to describe the National Labor Relations Board's dramatic number of rule reversals).

Agency oscillation, however, is not just an *Auer* deference phenomenon. It is also a symptom of agency rulemaking through adjudication. For example, the NLRB has been criticized for engaging in excessive legal and policy oscillation from administration to administration. *See* Michael C. Harper, *Judicial Control of the National Labor Relations Board's Lawmaking in the Age of Chevron and Brand X*, 89 BOSTON U.L. REV. 189, 229–33 (2009); Andrew M. Kramer, *The Clinton Labor Board: Difficult Times for a Management Representative*, 16 LAB. LAW. 75, 80 (2000); Bernard D. Meltzer, *Organizational Picketing and the NLRB: Five on a Seesaw*, 30 U. CHI. L. REV. 78, 78 (1962).

For decades, the NLRB abruptly has changed legal and policy positions on dozens of major rules affecting employees' free choice, including on issues dealing with representation elections, property rights, and bargaining units. *See, e.g.*:

- *Lamons Gasket Co.*, 357 NLRB 739 (2011), overruling *Dana Corp.*, 351 NLRB 434 (2007) (holding the NLRA precluded employees from obtaining a decertification election for at least six months after a card check recognition);
- *Purple Comm'ns, Inc.*, 361 NLRB 1050 (2014), overruling *Register Guard*, 351 NLRB 1110 (2007), *enfd. in relevant part and remanded sub nom. Guard Publ'g v. NLRB*, 571 F.3d 53 (D.C. Cir. 2009) (holding that under the NLRA, employers must permit employees to

use the employer's email systems for unionization campaigns because the previous holding focused too much on "property rights"); and

- *Miller & Anderson, Inc.*, 364 NLRB No. 39 (2016), overruling *Oakwood Care Center*, 343 NLRB 659 (2004) (holding a petitioned-for bargaining unit appropriate despite unrebutted evidence the bargaining unit had ceased to exist more than three years before the Board issued its decision).[5]

In recent months, the NLRB has proposed rulemakings dealing with key NLRA legal issues.[6] This will be of little value to the regulated public, however, if *Auer* and *Seminole Rock* are still law. If the agency can draft ambiguous final rules so that it can later shift policies without having to go through notice-and-comment rulemaking again, the regulated public—including employees—will be in the same position. It will be as if the NLRB had continued to regulate through adjudication without the public's

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[5] The NLRB's legal and policy oscillation is not isolated to recent administrations. *See, e.g.*, Estreicher, *Policy Oscillation at the Labor Board*, 37 Admin. L. Rev. 163 (criticizing the NLRB during the Reagan Administration for policy oscillation through adjudication and arguing for rulemaking instead).

[6] *See, e.g., Board Proposes Rule to Change its Joint-Employer Standard*, NATIONAL LABOR RELATIONS BOARD (Sep. 13, 2018), https://www.nlrb.gov/news-outreach/news-story/board-proposes-rule-change-its-joint-employer-standard.

administrative due process protections of the APA's rulemaking (or amendment) requirements.

The NLRB should be lauded for its recent trend of utilizing its quasi-legislative power to make rules instead of ad-hoc quasi-judicial adjudication.[7] But if the agency can ignore the APA and the protections it provides by later amending its rules through interpretation alone, the current shift to rulemaking will be of little value. Indeed, the very same evils that are produced by ad-hoc adjudication will be replicated on the back-end of rulemaking through *Auer* deference. It is thus important this Court overrule *Auer* and *Seminole Rock*.

C. Overruling *Auer* and *Seminole Rock* is an essential first step for restoring the rule of law to the administrative state.

Overruling *Auer* and *Seminole Rock* is important for restoring the rule of law to the administrative state, but it should only be the start. Ignoring the APA and granting deference to administrative agencies in general has caused incalculable damage to the regulated public's individual rights. For example,

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[7] This Court and legal academy members have chastised the NLRB for decades over not utilizing the APA's notice-and-comment procedures. *See, e.g., NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 765 (1969) (plurality opinion); Jeffery S. Lubbers, *The Potential of Rulemaking by the NLRB*, 5 FIU L. REV. 411 (2010).

Chevron[8] deference should be reconsidered by the Court in an appropriate case because it infringes on core constitutional rights and violates the APA. *See Mich. v. EPA*, 135 S. Ct. 2699, 2712 (2015) (Thomas, J., concurring); *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1149 (2016) (Gorsuch, J., concurring).

There is another area of deference, and one arguably connected to *Auer* deference, that this Court should also revisit. In *SEC v. Chenery Corp.*, a pre-APA case, the Court held that "the choice made between proceeding by general rule or by individual, ad hoc litigation is one that lies primarily in the informed discretion of the administrative agency." 332 U.S. 194, 203 (1947). There is an argument that *Auer* deference and the *Chenery* doctrine are substitutes, if imperfect, and that if *Auer* deference is no longer available to agencies, they will revert to utilizing ad-hoc quasi-judicial lawmaking through adjudications instead of using quasi-legislative rulemaking. *See, e.g.*, Aaron L. Nielson, *Beyond Seminole Rock*, 105 GEO. L.J. 943, 964–65 (2017) (arguing that overruling *Auer* deference to an agency's regulatory interpretations might lead agencies to utilize their discretion to make law by ad-hoc adjudication, rather than the quasi-legislative notice-and-comment rulemaking).

There is little evidence that agencies currently utilizing notice-and-comment rulemaking would re-

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[8] *Chevron, U.S.A., Inc. v. Nat'l Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

gress to ad-hoc adjudication.[9] Nevertheless, if there is merit to the argument that overruling *Auer* and *Seminole Rock* might lead to more ad-hoc adjudication, not overruling *Auer* deference because of possible secondary effects would be like having a hole in your boat and not fixing it because there is a second hole in your boat. Rather, you fix both holes.

Thus, this Court should revisit and overrule, or at least limit, *Chenery*.[10] It should do so for two reasons. First, *Chenery* is, like *Auer* deference, inconsistent with the APA's text. APA Section 551 defines rulemaking as the "agency process for formulating, amending, or repealing a rule." 5 U.S.C. § 551(5). A rule, in turn, is defined, in relevant part, as "the whole or a part of an agency statement of general or particular applicability and future effect designed to

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[9] John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612, 665 (1996) ("Agencies are not institutionally indifferent to the choice between rulemaking and adjudication. Although *Chenery* does give agencies a presumptive legal right to implement their delegations through adjudication, practical or legal concerns may induce them to use rulemaking in particular contexts."); *see also*, *id.* at 666 (noting "the demand for agency rulemaking may reflect external political or legal requirements that have been imposed on the agency. In reaction to growing perceptions of regulatory torpidity and agency capture, reform movements in the 1960s emphasized rulemaking and "extolled its virtues of efficiency, fairness, and political accountability" (quotation marks and footnotes omitted)).

[10] Nielson, *Beyond Seminole Rock*, 105 GEO. L.J. at 989–1000 (arguing the Court should limit *Chenery* if it overturns *Auer*).

implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency[.]" 5 U.S.C. § 551(4). Thus, if an agency wants to formulate a rule, it must use the notice-and-comment rulemaking procedures. *See* 5 U.S.C. § 553. The Court upheld *Chenery* in *NLRB v. Bell Aerospace Co.*, 416 U.S. 267 (1974), but did so only with a brief nod to the APA's text in a footnote. *See id.* at 291 n.21.

Second, *Chenery* subverts fair notice by allowing legal retroactivity. In the process of "deferring to agency discretion," the Court in *Chenery* upheld a rule applied for the first time in an adjudication that made illegal conduct that was perfectly legal before that adjudication. In describing the Court's decision as "lawlessness" in his dissent, Justice Jackson noticed the problem from the outset: "This decision is an ominous one to those who believe that men should be governed by laws that they may ascertain and abide by, and which will guide the action of those in authority as well as of those who are subject to authority." *Chenery*, 332 U.S. at 217 (Jackson, J. dissenting).

Administrative agencies like the NLRB have been allowed to make law—sometimes retroactively—ever since without going through the proper APA procedures, at great cost to administrative due process rights. This Court should address Justice Jackson's warning from long ago and revisit *Chenery* after it overrules *Auer* and *Seminole Rock*.

CONCLUSION

For the foregoing reasons, and those stated by the Petitioner, the Court should overrule *Auer* and *Seminole Rock*.

Respectfully submitted,

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